NO. 14-14-00589-CV

IN THE COURT OF APPEALS
FOURTEENTH JUDICIAL DISTRICT
HOUSTON, TEXAS

1717 BISSONNET, L.L.C.,

Defendant/Appellant/Cross-Appellee

vs.

PENELOPE LOUGHHEAD, ET AL.,

Plaintiffs/Appellees/Cross-Appellants

On Appeal from Case Number 2013-25155,
in the 157th Judicial District Court, Harris County, Texas

REPLY BRIEF OF PENELOPE LOUGHEAD, ET AL., AS CROSS APPELLANTS

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SUMMARY OF THE ARGUMENT IN REPLY

In their brief as Cross-Appellants, Plaintiffs/Appellees/Cross Appellants ("Plaintiffs") demonstrated that the trial court abused its discretion in declining to enter a permanent injunction in light of the jury's unanimous finding of nuisance and the evidence before that court. In response, Defendant/Cross-Appellee 1717 Bissonnet, L.L.C. (the "Developer"), strikes the same chords as in its prior briefs although it purports to raise a number of intertwined cross-points.[1]

From the earliest stages of this case, the Developer has attempted to create impossible hurdles to Plaintiffs' nuisance claims. Two primary and related focuses of this effort have been (1) the assertion that a trial court cannot grant injunctive relief to prevent a nuisance because the Defendant might change its building plans, raising questions of mootness; and (2) the assertion that nuisance law requires that each alleged element of the purported nuisance be examined separately to determine whether it would support a verdict in favor of the plaintiff. These erroneous positions are the basis for two of the Developer's cross-points (numbers 3 and 4) and underpin all of the arguments in the Developer's Cross Appellee's Brief.

During the post-verdict hearings on Plaintiffs' request for a permanent injunction, the Developer announced to the trial court that it no longer intended to

[1] Two of the Developer's "cross points" (numbered 1 and 5) simply reiterate attacks on the verdict already asserted in the Developer's Appellant's Brief. Plaintiffs thoroughly addressed these argument in their Appellees' Brief and will not revisit them here.

build the Ashby High Rise exactly as proposed at the time of trial, but instead had made minor design changes that purported to address certain issues that the Developer believed were the basis for the jury verdict. These slight proposed non-binding alterations are, according to the Developer's argument, sufficient to moot Plaintiffs' request for injunctive relief. The Developer does not mention that it obtained building permits from the City of Houston based on the plans that the jury found would constitute a nuisance if built. The Developer does not reveal that it discussed its plans in detail in sworn testimony during the trial,[2] or that the Developer indicated in its sworn testimony that its plans included what it now contends is one of the "changes" sufficient to moot the appeal.[3]

The Developer's pronounced "intent" to modify the design in minor ways after obtaining permits from the City of Houston is not a sufficient basis to moot the Plaintiffs' request for injunctive relief. Instead, the trial court should have enjoined the Ashby High Rise as permitted by the City of Houston. If the Developer then made adjustments that it believed were sufficient to address the problems giving rise to the nuisance, the appropriate procedure would be for the Developer to seek to commence construction pursuant to its amended plans and defend a potential contempt action.

[2] *See, e.g.*, 10 RR 199:2-204:19.
[3] *Compare* 10 RR 216:1-13.

Contrary to the Developer's position, the nuisance injuries in this case "are not indivisible."[4] As it did in the trial court, the Developer purports to divine the basis for the jury's verdict and attack each point individually. As the trial court correctly recognized, "nuisance cases in Texas demonstrate that all evidence, taken together, is to be considered in determining whether a nuisance exists."[5] The jury was properly asked a general question and found that the Ashby High Rise—or the "Project" defined to mean "the 21-story mixed-use building that 1717 Bissonnet proposes to construct at the corner of Bissonnet Road and Ashby St."—would constitute a private nuisance if built.[6] Under Texas law, the jury's "yes" answer to that question is a sufficient basis on which to issue a permanent injunction. *See, e.g., Freedman v. Briarcroft Property Owners, Inc.*, 776 S.W.2d 212, 214 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

Three of the remaining cross-points (numbers 2, 6, and 7) contain assertions of waiver, which take several forms. First, the Developer argues that the trial court "implicitly relied" on two independently sufficient grounds for denying injunctive relief that Plaintiffs left unchallenged in their brief. Not only does the Developer's "implicit reliance" claim fail upon examination of the entirety of the trial court's judgment, its claim that Plaintiffs left both grounds unchallenged is erroneous. The

[4] Cross-Appellee's Brief at 6.
[5] CR 1205.
[6] CR 732-33.

second waiver argument is equally flimsy; in it, the Developer contends that Plaintiffs seek relief on appeal greater than they sought in the trial court. Again, careful examination of the Plaintiffs' arguments and the jury verdict makes clear that Plaintiffs ask this Court for relief identical to that which they sought in the trial court. The Developer next suggests that Plaintiffs must "offer to remit" the damage award to be entitled to injunctive relief. Plaintiffs made abundantly clear in the trial court that their primary goal was injunctive relief. They have always argued and understood that an injunction, if granted, would preclude an award of damages.[7]

Finally, in addition to its "cross-points," and points previously made in its Appellants' Brief, the Developer argues that Plaintiffs' discussion of the Developer's apparent willingness to mislead the City in the permitting process and to engage in sharp litigation tactics is an "*ad hominem*" attack and a "red herring." The Developer's tactics were highly relevant to a balance of the equities and support Plaintiffs' contention that the trial court committed error in performing that balancing.

[7] *See, e.g.*, 17 RR 8:1-4 (Plaintiffs' counsel indicating that Plaintiffs "have always conceded" that an order of injunction precludes damages).

ARGUMENT IN REPLY

I. Injunctive Relief is Appropriate to Protect Against Nuisance

The Developer's fundamental arguments against injunctive relief—i.e., that the requested injunction is moot, and that each of the claimed elements of nuisance must be independently examined—rely on a faulty analysis of Texas law. The proper procedural approach to the Plaintiffs' nuisance claim would effectively resolve both of the Developer's avenues of attack.

A. The Developer's last-minute non-binding announcement of modifications to its plans does not moot or otherwise alter the availability of injunctive relief.

The Developer argues that after the jury's verdict, it decided to make certain minor modifications to its plans for the Ashby High Rise. The Developer first mentioned this purported decision to the trial court during the post-verdict hearings on injunctive relief.[8] In a letter to the trial court subsequent to that hearing, the Developer asserts that "Defendant will proceed to build the building with the following changes," and then enumerated changes including increasing the depth of the foundation piles, installing architectural screening on the garage openings, and installing landscape planters on the amenity deck.[9] The Developer argues that this last-minute, non-binding expression of a purported intent to make minor changes to

[8] 17 RR 5:13-6:12; CR 1182-83.
[9] CR 1182-83.

the plans mooted Plaintiffs' request for injunctive relief. Neither the law nor common sense supports the Developer's argument.

1. Two of the Developer's proposed "modifications" do not differ from the plan presented to the jury.

At least two of the three proposed "changes" to the Developer's plans do not constitute changes, at least from the plans the Developer presented to the jury. In his testimony on behalf of the Developer, Mr. Kirton described an architectural rendering, explaining that planters and plantings placed on the amenity deck would alleviate privacy concerns.[10] The Developer's professed intention to "install landscape planters along the edges of the amenity deck" is not different from the design it discussed with the jury.

Similarly, it is far from clear whether and how the Developer's post-verdict assertion that it will "install architectural screening in the openings of the garage along the south and east sides" differs from its pre-verdict obligation to provide a screen to cover those openings pursuant to its Settlement Agreement with the City of Houston. That Settlement Agreement[11] requires that the Developer "must ensure . . . that the entire south and east walls of the Project's parking garage . . . must have an exterior vegetative covering system (e.g. trellis or wall system)." Although the evidence suggested that the Developer did not intend to fully comply with this

[10] 10 RR 215:14-216:18.
[11] PX 55.

obligation under the Settlement Agreement[12], the Developer certainly argued and testified at trial that it intended to screen the garage.[13] Its assertion that garage screening is a modification to the plans reviewed by the jury is misleading.

2. The plan that the jury considered is the plan that the City of Houston has approved.

A primary theme of the Developer's defense at trial was that its plans for the Ashby High Rise had been fully permitted by the City of Houston. This City permit, according to the Developer's argument, fully secured its right to build the structure as planned. Plaintiffs brought their suit based on the permitted structure and obtained a finding that the structure would constitute a nuisance.

Once the trial had ended, and the jury rendered its verdict, the Developer's focus on the effects of the City approval dimmed. Instead of trumpeting the importance of permitting, the Developer all but ignored it. The City's approval of the Developer's plans for the foundation, for example, apparently does not mean that the Developer cannot alter its plans for the construction of the foundation. The Developer simply asserted in the trial court that it has changed its plans and its new intention is to sink the foundation piles to a greater depth than originally planned.[14]

[12] PX 78.
[13] 3 RR 57:21-25 (argument that Developer would screen the garage); 11 RR 149:13-150.
[14] 117 RR 172:10-20.

The Developer does not mention City permitting, and it is not clear whether or to what extent additional permitting will be required.

3. The Developer's assertion of its "intent" to modify its plans does not moot the request for injunctive relief.

A professed abandonment of an intent to construct a nuisance does not moot a request for injunction. *See Lee v. Bowles*, 397 S.W.2d 923, 927 (Tex. Civ. App.—San Antonio 1965, no writ) (trial court entered an injunction after defendant abandoned intent to construct nuisance). Federal courts have held in analogous contexts that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave [t]he defendant . . . free to return to his old ways. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 189 (2000) (internal citations and quotation marks omitted). The standard for allowing a defendant to moot an action in this way is especially stringent: "A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968).

The evidence at trial demonstrated that the Developer had deceived the City by intentionally submitting false plans to obtain a permit,[15] that it had deceived its

[15] PX63; 11 RR 171:3-12.

own traffic expert to submit a trip count that complied with the City settlement agreement but did not accurately reflect the plans,[16] and that it attempted to deceive the trial court and the jury by withholding critical information about soil testing.[17] It then asked the trial court to simply accept the word of its foundation "expert" that the proposed foundation changes would prevent the likely harm to neighboring houses. That "expert" testified that no new foundation drawings had been prepared, and that no structural engineer had been consulted.[18]

Such a non-binding representation from the Developer regarding its intent, without any plans or engineering, cannot not be a sufficient basis for a finding of mootness. Instead, the trial court could have relied on the Developer's professed intent ***not*** to build the proposed nuisance as a basis for granting Plaintiffs' request for injunctive relief. *See Lee*, 397 S.W.2d at 927 (injunction entered after intent to build was abandoned).

B. The jury's answer to the nuisance question was a sufficient basis on which to grant injunctive relief.

The Developer contends that the jury's verdict did not supply the trial court with a sufficient basis on which to grant injunctive relief. As set forth more fully in Plaintiffs' Response Brief as appellee, the jury was charged pursuant to the Texas

[16] 12 RR 32:5-25.
[17] 10 RR 15:28-29; PX385; DX143.
[18] 17 RR 115:4-116:15.

Pattern Jury Charge and returned a unanimous verdict that the Ashby High Rise, if constructed, would constitute a nuisance. In spite of the Developer's efforts to parse this verdict and to challenge the underlying evidence as insufficient, the jury was required under Texas law to determine whether all the evidence, ***taken together***, proved that the Ashby High Rise would be a nuisance. *See Freedman v. Briarcroft Prop. Owners, Inc.*, 776 S.W.2d 212, 216 (Tex. App.—Houston [14th Dist.] 1989, writ denied) ("Whether a nuisance exists is a question to be determined not merely by a consideration of the thing itself, but with respect to all attendant circumstances"); *see also GTE Mobilnet of South Texas Ltd. Partnership v. Pascouet*, 61 S.W.3d 599 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (combination of light and noise constituted nuisance); *Lamesa Co-op Gin v. Peltier*, 342 S.W.2d 613 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e) (loud noises, glaring lights, dust, odors, smoke and cotton lint combined to support nuisance findings).

The jury's finding of nuisance provided a sufficient ground for granting a permanent injunction as Texas law provides that a nuisance may be permanently enjoined. *Freedman*, 776 S.W.2d at 216. There was no necessity for a more detailed verdict, and the trial court erred in refusing to grant injunctive relief.

C. The Proper Procedure Would Resolve Both Alleged Mootness and the Purported Difficulties with a General Verdict.

The issues the Developer raises regarding mootness and the purported necessity for a granulated verdict could be avoided by approaching the Plaintiffs' nuisance claim as the trial and appellate courts did in *Champion Forest Baptist Church v. Rowe,* 1987 WL 5188 (Tex. App. – Houston [1st Dist.] Jan. 8, 1987). In *Champion Forest,* the trial court entered a permanent injunction against the defendant church's construction of a parking garage. The injunction enjoined the defendant "from constructing the ***proposed*** parking garage at the ***proposed*** site." *See* Copy of Order granting Permanent Injunction, CR 1053-57 (emphasis added). The First Court of Appeals affirmed the permanent injunction. *Champion Forest,* 1987 WL at 5188.

After the injunction was entered, the church substantially redesigned the garage to change it from the proposal that was enjoined. In its redesign, the church sought to remedy those aspects that gave rise the nuisance, by increasing the setbacks and changing the traffic flow. *See Rowe v. Moore,* 756 S.W.2d 117, 118 (Tex. App.—Houston [1st Dist.] 1988, orig. proceeding). Rowe, one of the original plaintiffs from the *Champion Forest* case, returned to the trial court to fight the modified plan, arguing that construction of the redesigned garage would violate the injunction. *Id.* Rowe sought an order of contempt, which the trial court denied.

Rowe filed a petition for writ of mandamus. The First Court of Appeals refused to issue the writ, finding that the trial court had not abused its discretion. *Id.*

The *Champion Forest* case provides an excellent model for the proper approach to a request for injunctive relief against the construction of a prospective nuisance. Use of this approach would avoid both of the issues that the Developer seeks to exploit in challenging the availability of injunctive relief here. The *Champion Forest* approach also incentivizes a Defendant who has proposed to build a nuisance to reconsider its plans and modify them in a legitimate way to mitigate the problem.

II. Plaintiffs are not barred by waiver or otherwise from pursuing their claims on appeal.

The Developer asserts that Plaintiffs are barred from pursuing their claim for injunctive relief in three ways. First, the Developer urges that Plaintiffs have waived their cross-appeal by failing to challenge two independent grounds for the trial court's judgment. Examination of the trial court's judgment reveals that it did not rely on either of the asserted grounds for its judgment, and examination of the Plaintiffs' Brief on Cross Appeal makes clear that Plaintiffs did not waive the arguments. Second, the Developer contends that Plaintiffs seek greater relief on appeal than they sought in the trial court. This assertion is simply error. Finally, the Developer contends that Plaintiffs must agree to a remittitur to obtain an order of injunctive relief; Plaintiffs have unequivocally done so.

A. The trial court did not adopt the Developer's mootness argument and Plaintiffs did not fail to address the argument.

The sole basis for the Developer's contention that the trial court "implicitly" adopted its mootness argument in support of its denial of the requested injunctive relief is the lower court's use of phrases such as "for the reasons stated here and in defendant's opposition briefs" in its written Opinion and Order.[19] This phrase cannot properly be understood to mean that the trial court adopted—implicitly or otherwise—the Developer's contention that its purported intent to slightly alter its plans mooted the request for injunction.

In its Opinion and Order, the trial court denies the Developer's motion for judgment, holding that there is sufficient evidence to sustain the jury's verdict that the Ashby High Rise will be a nuisance if built.[20] The trial court also entered judgment on the jury's damage award.[21] Had the trial court concluded that the Developer's mootness argument was sound, it would have necessarily rejected Plaintiffs' damage claim. That is, as the Developer points out in its brief, the availability of damages is dependent on the denial of injunctive relief because they are based on the same liability finding. Thus, if the proposed minor alterations to the Ashby High Rise were sufficient to moot the claim for injunctive relief, they

[19] *See, e.g.,* CR 1190.
[20] CR 1205.
[21] CR 1216; 1271-75.

would likewise moot the damage claim. Given that the trial court entered judgment for damages, it is clear that the court did not adopt the Developer's mootness argument.

Furthermore, Plaintiffs' brief as Cross Appellants argued at length that the trial court erred in imposing on Plaintiffs the impossible burden of designing a building that would not constitute a nuisance.[22] This argument effectively challenges the Developer's mootness argument by making clear that it was the ***defendant's*** burden to propose at trial any modifications that would alleviate the problems giving rise to nuisance. The Developer failed to adduce evidence regarding any proposed modifications. Plaintiffs argued in their Cross Appellants' Brief that the trial court erroneously suggested that Plaintiffs should shoulder this burden.

B. The trial court did not adopt the Developer's argument that no imminent harm exists, and Plaintiffs did not fail to address the argument.

The Developer makes a similar argument that the trial court implicitly adopted its specific contention that no imminent harm exists through phrases in its Opinion and Order. As with its argument regarding mootness, the trial court could not have agreed that no imminent harm existed and at the same time enter judgment for damages.

[22] Cross-Appellants' Brief at 28-31.

Plaintiffs fully set forth their argument that imminent and irreparable harm exists on pages 38 and 39 of their Cross Appellants' Brief. That argument addresses threatened physical harm to Plaintiffs' homes and diminished market value of those homes. Accordingly, the Developer's argument that Plaintiffs have failed to challenge this purported basis for the trial court's judgment is misplaced.

C. Plaintiffs seek precisely the same relief from this Court as they did from the trial court.

The Developer attacks Plaintiffs' request for relief, contending that it differs from their request from the trial court. In their brief, Plaintiffs define "Ashby High Rise" to mean the same thing that the term "Project" means in the jury charge and in the trial court's Opinion and Order. Plaintiffs introduce the identified term on page 1 of their brief, describing it as "a massive, 21-story mixed-use development" on the corner of Ashby and Bissonnet that the "Developers plan to construct." [23] Plaintiffs then state that the first jury issue "asked whether the Ashby High Rise would be a nuisance, if built."[24] There can hardly be any doubt that the identified term "Ashby High Rise" was defined to mean and did in fact refer to the structure that the Developer planned to build.

[23] *Id.* at 1.
[24] *Id.*

When Plaintiffs ask that this Court "issue a judgment permanently enjoining the Ashby High Rise," they ask for precisely the same relief that they sought in the trial court. The Developer's arguments to the contrary fail.

D. Plaintiffs agree that injunctive relief would preclude an award of damages.

The Developer's final cross point—that Plaintiffs have elected damages over injunctive relief—is not supported by the record. Plaintiffs concede, as they always have, that injunctive relief would preclude the award of damages.[25] In the event that this Court agrees that injunctive relief should have been granted, it may suggest a remittitur of the damage award consistent with Texas law. *See, e.g., Arkoma Basin Exploration Co., Inc. v. FMF Associates 1990-A, Ltd.*, 249 S.W.3d 380, 390 (Tex. 2008).

III. The evidence regarding the Developer's tactics in securing its permits and sharp trial practices demonstrates the trial court's error balancing of equities.

The Developer complains that Plaintiffs engage in *ad hominem* attacks that are not relevant. As fully set forth in the Cross Appellants' Brief, the Developer's tactics with the City, with its own traffic expert and with the trial court itself were highly relevant to a balance of the equities. The trial court erroneously suggested that the balance of the equities favored the Developer while failing to consider the

[25] 17 RR 8:1-4.

compelling evidence demonstrating that the Developer had intentionally mislead the city in the permitting process, had allowed its expert to mislead the trial court, and had failed to reveal the existence of potentially harmful evidence until this tactic was uncovered by Plaintiffs. Far from being irrelevant to the questions before this Court, the evidence of the Developer's persistent misbehavior is central to whether the trial court abused its discretion in denying the requested injunction.

The trial court compounded its error in failing to consider the Developer's misleading actions by crediting the Developer's unsupported claims of loss if injunction had been entered. As Plaintiffs pointed out to the trial court, the Developer claimed a loss of profits without offering any evidence of costs it would incur or profits it would earn if it invested the same dollars elsewhere. The Developer also failed to offer any evidence of potential profits it would earn if it sold the land and built the high rise project at another more appropriate site. Without any comparative analysis, the gross "loss profits" figure was meaningless and provided the trial court with no competent evidence of harm to the Developer.

CONCLUSION AND PRAYER

The trial court committed several legal errors causing it to abuse its discretion in refusing to issue the requested injunction. Plaintiffs respectfully request that this Court reverse the trial court's denial of injunctive relief and issue a judgment permanently enjoining the Ashby High Rise.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this Brief contains 3852 words, excluding the words not included in the word count pursuant to Texas Rule of Appellate Procedure 9.4(i)(1). This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

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CERTIFICATE OF SERVICE

As required by Texas Rules of Appellate Procedure 6.3 and 9.5, I certify that I have served this document on all parties on August 18, 2015 via e-filing and/or e-mail.

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